and without taking into consideration the proceeds of insurance. I therefore gave judgment for the plaintiff as prayed for in the statement of claim. As the insurance company was subrogated to the rights of the plaintiff and has brought the action in the name of the plaintiff it would therefore be entitled to recover the said sum of $177,849.57, interest thereon at the rate of 8% pa from 14 January 1984 to the date of payment and costs.

Order accordingly.

Solicitors: *Shook Lin & Bok*; *Syed Alwi, Ng & Teoh.*

Reported by *Prof Ahmad Ibrahim*

Syed Abu Tahir a/l Mohamed Esmail v Public Prosecutor

HIGH COURT (KUALA LUMPUR) – CRIMINAL APPEAL NO 52-21-87
ZAKARIA YATIM J
13 AUGUST 1988

Criminal Law – Kidnapping of minor professing Muslim religion from lawful guardianship – Whether consent of minor relevant – Meaning of 'lawful guardian' – Whether includes mother – Rape – Intercourse with girl under 14 years of age – Whether consent of girl material – Sentencing – Offences of kidnapping and rape – Whether sentences excessive – Constitution (Amendment) (No 2) Act 1973, s 6(1) – Enactment 6 of 1961 (Selangor) – Guardianship of Infants Act 1961, ss 1(2), 5 & 6 – Penal Code (FMS Cap 45), ss 361 & 376

Evidence – Rape – Evidence given by minor – Corroboration – Whether medical evidence sufficient corroboration

Words and Phrases – 'Lawful guardian' – 'Lawfully entrusted' – Penal Code (FMS Cap 45), s 361

The appellant was convicted in the Sessions Court of the offence of kidnapping a female Muslim minor aged 13 years and 10 months from the lawful guardianship of her mother and of raping the minor. The minor's parents were Muslims. Both offences were alleged to have been committed in the Federal Territory. The President of the Sessions Court concluded that the kidnapping charge under s 361 of the Penal Code had been proved, having found that the girl was a minor, below the age of 16 years, and that the appellant took her without the consent of her lawful guardians, that is, her parents. The President also was satisfied that the charge of rape had been proved in that the ingredients of the offence under s 376 of the Penal Code had been proved, namely, that there was sexual intercourse between the appellant and the girl; there was penetration; and there was no consent as the girl was below the age of 14 years.

The defence contended that the lawful guardian of the girl was her father and that the commission of the offence of kidnapping had therefore not been proved. As regards the charge of rape, the defence submitted that the girl was a 'totally incredible witness'.

It was also argued that the sentences of four years' imprisonment with effect from the date of arrest on the kidnapping conviction and six years' imprisonment with effect from the date of arrest and a fine of $5,000 in default nine months' imprisonment in respect of the rape conviction were excessive.

Held, reducing the sentence for kidnapping while affirming the sentence for rape:

(1) By s 5 of the Guardianship of Infants Act 1961, the father of an infant shall be the guardian of the infant. By s 1(2) of the Act, nothing in the Act shall apply in any State to persons professing the Muslim religion until the Act has been adopted by a law made by the legislature of that State. In the State of Selangor, the Act had been adopted by Enactment 6 of 1961 and by virtue of s 6(1) of the Constitution (Amendment) (No 2) Act 1973 (Act A206), the said Enactment continued in the Federal Territory.

(2) In considering the expression 'lawful guardian' contained in s 361 of the Code, the court must give it a meaning which accords, not only with s 5 of the Guardianship of Infants Act but also with the explanation provided to s 361 of the Code. The explanation states that the words 'lawful guardian' in the section include any person lawfully entrusted with the care or custody of such minor or other person. The words 'lawfully entrusted' must be construed liberally. It is not intended that the entrustment should be made in a formal manner. It can be done orally and it is not even necessary that there should be direct evidence available about the entrustment as such. From the course of conduct and from the other surrounding circumstances it would be open to the court to infer lawful entrustment in favour of the person in whose custody the minor is living and who is taking her care in all reasonable ways.

(3) In view of the evidence and in the circumstances of this case, it was clear that the mother was also the lawful guardian.

(4) From the evidence, it was clear that the appellant took the girl out of the keeping of the lawful guardianship of her parents. The taking was done without the consent of her parents. It might be possible that the girl consented to go with the appellant. But even if she had consented, her consent was immaterial for the commission of the offence under s 361 of the Penal Code.

(5) The evidence of the girl regarding her acts of sexual intercourse with the appellant was sufficiently corroborated by the two doctors who examined the girl and the appellant respectively. In a case of this nature, medical evidence is sufficient to corroborate the evidence of the girl.

(6) It was immaterial whether the girl gave her consent or not. A person commits the offence of rape when he has sexual intercourse with a girl below the age of 14 years.

(7) In the present case, in regard to the kidnapping conviction, the sentence was excessive and should be reduced to two years' imprisonment from the date of arrest. In respect of the rape conviction, the sentence was not manifestly excessive and should not be disturbed. The sentences were to run concurrently.

Cases referred to

1 *DPP* v *Abdul Rahman* [1963] MLJ 213 (folld)
2 *State* v *Harbansing Kisangsing* [1954] Cr LJ 1032 (folld)
3 *Neelakandan* v *PP* [1956] MLJ 208 (folld)
4 *Brabakaran* v *PP* [1966] 1 MLJ 64 (refd)
5 *PP* v *Selvarajah* [1984] 1 MLJ 93 (refd)

Legislation referred to
Constitution (Amendment) (No 2) Act 1973 s 6(1)
Enactment 6 of 1961 (Selangor)
Guardianship of Infants Act 1961 ss 1(2), 5, 6
Penal Code (FMS Cap 45) ss 361, 363, 376
Women and Girls Protection Act 1963 s 16(1)

K Ganesh for the appellant.
Foo Lee Mei (Miss) (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Zakaria Yatim J: The appellant was charged in the Sessions Court, Kuala Lumpur, with an offence of kidnapping a female minor aged 13 years 10 months from her lawful guardianship. He was also charged with an offence of raping the said female minor. The appellant was found guilty and he was convicted in respect of both charges. The learned President, Puan Rahman Hussein, sentenced the appellant to four years' imprisonment with effect from the date of arrest in respect of the first charge and six years' imprisonment with effect from date of arrest and fined him $5,000 in default nine months' imprisonment in respect of the second charge. Both sentences were ordered to run concurrently.

The charges against the appellant are as follows:

First charge
That you on 24 April 1986 at about 2 pm at Vivekannanda Secondary School, Jalan Brickfields in the Federal Territory of Kuala Lumpur did kidnap one Farida bte Abdul Rahim, a female minor aged 13 years 10 months from the lawful guardianship of Hassan Fatimah bte Mohd Ibrahim and that you have thereby committed an offence punishable under s 363 of the Penal Code.

Second charge
That you on 9 May 1986 at about 9 pm at No 36/1, Jalan Siput 8, Taman Wahyu in the Federal Territory of Kuala Lumpur, did rape one Farida bte Abdul Rahim, aged 13 years 10 months and that you have thereby committed an offence punishable under s 376 of the Penal Code.

The facts relied upon by the prosecution may be summarized as follows: On 25 April 1986 at about 2 pm Farida bte Abdul Rahim ('the girl') left her house for school. She walked to school, which was less than a mile away from her house. When she left for school she was in her school uniform and she carried her school bag. On the day in question, she was 13 years 10 months old. As she was reaching school she met the appellant. The appellant persuaded her to follow him. The appellant took her in a taxi and brought her to see a film show. After the film show, the appellant took her to the house of Manickam (PW2), where they stayed for two weeks. According to the girl, after staying for one week in PW2's house, the appellant took her to his place of work, where the appellant raped her. After staying two weeks in PW2's house, they left the place and went to stay in a room in a house belonging to a Chinese. The appellant rented the room. On the day they arrived in the Chinese's house, the appellant raped her again. On 12 May 1986, the girl asked the appellant to take her home. She returned home on the same day at about 2 pm.

At the close of the case for the prosecution the learned President found that the prosecution had made out a prima facie case against the appellant on both charges.

I shall first consider the kidnapping charge. The learned President in her grounds of judgment, said that she was satisfied that all the ingredients under s 361 of the Penal Code (FMS Cap 45) had been proved. She came to this conclusion because (a) the girl was a minor, below the age of 16 years; and (b) the appellant took her 'without the consent of her lawful guardians, that is, her parents'.

Under s 361 of the Penal Code, whoever takes or entices any minor under 16 years of age, if a female out of the keeping of the lawful guardian of such minor without the consent of such guardian is said to kidnap such minor from lawful guardianship. It is clear beyond reasonable doubt that in the present case the girl was below the age of 16. Her birth certificate (P8) states that she was born on 28 July 1972. On the date the appellant took her away when she was going to school, she was not even fourteen years old.

The next question to consider is whether the appellant took the girl out of the keeping of her lawful guardian? In order to consider this question it is necessary to determine who is her lawful guardian. The first charge states that the girl was kidnapped from the lawful guardianship of Hassan Fatimah bte Mohd Ibrahim. Hassan Fatimah was the fifth prosecution witness and she is the mother of the girl. Mr Ganesh, counsel for the appellants, in his written submission stated that the lawful guardian of the girl was her father. In support of his argument he referred to s 5 of the Guardianship of Infants Act 1961 ('the Act') which states that '... the father of an infant shall be the guardian of the infant's person and property ...'

The question that arises here is whether the Act applies in the instant case? According to the girl's birth certificate (P8) the parents of the girl are both Indian Muslims and it follows that the girl must be a Muslim too. Section 1(2) of the Act states that 'nothing in this Act shall apply in any State to persons professing the Muslim religion until this Act has been adopted by a law made by the legislature of that State'. In the State of Selangor, the Act has been adopted by Enactment 6 of 1961. Under this Enactment, the Act applies to persons professing the Muslim religion. By virtue of s 6(1) of the Constitution (Amendment) (No 2) Act 1973 (Act A206), the said Enactment continued in force in the Federal Territory.

It is clear, therefore, that in the present case, the father of the girl was the lawful guardian. Under s 5 of the Act, the mother could not become the lawful guardian of the girl. The mother would only become the guardian of the girl if the father was no longer alive: see s 6 of the Act.

From the record of the proceedings in the court below, there is evidence that the girl had a lawful father by the name of Abdul Raheem s/o Ahmedsa Rowther. (See birth certificate of the girl (P8).) He was present in court during the trial and was identified in court as the husband of Hassan Fatimah. Both Abdul Raheem and Hassan Fatimah were, at all material times, husband and wife and they lived together in the same house together with their children including the girl. I have no doubt that, under the Act, Abdul Raheem was the lawful guardian of the girl on the date she was alleged to have been kidnapped by the appellant.

In considering the expression 'lawful guardian' in s 361 of the Penal Code the court must give it a meaning which accords not only with s 5 of the Act, but also with the explanation to s 361: see *DPP* v *Abdul Rahman.*[1] The explanation to s 361 states that 'the words 'lawful guardian' in this section include any person *lawfully entrusted* with the care or custody of such minor or other person' (emphasis added). The words 'lawfully entrusted' which appear in the explanation must be construed liberally. It is not intended that the entrustment should be made in a formal manner. It can be done orally and it is not even necessary that there should be direct evidence available about the entrustment as such. From the course of conduct and from the other surrounding circumstances it would be open to the court to infer lawful entrustment in favour of the person in whose custody the minor is living and who is taking her care in all reasonable ways: see *State* v *Harbansing Kisangsing.*[2]

In my opinion, from the explanation to s 361, the words 'lawful guardian' in the section include the mother of the girl in the present case. As her mother, it was her natural obligation to look after the girl. She brought her up and took care of her as her daughter. From the evidence, the girl stayed with her parents at all material times. In her evidence, the mother (PW5) said, 'I provide for her well.' On 25 April 1986 when the girl did not return home at 7pm or 8pm, she searched for her. She inquired of her school friends but she could not find her. The following day she lodged a report at the Brickfields Police Station. When the girl returned home two weeks later, the mother took her daughter to the police station and lodged a report. When there was a marriage proposal to marry the girl with the appellant after the incident, the mother of the girl as well as the father refused to accept the proposal.

In view of the evidence and in the circumstances of this case, it is clear that the mother (PW5) was also the lawful guardian. It was, therefore, proper for the prosecution to charge the appellant with kidnapping the girl from the lawful guardianship of her mother.

The next point to consider is whether the appellant took away the girl from her lawful guardian. According to the girl, on 25 April 1986, at about 2 pm, she left for school. She was wearing her school uniform and carrying her school bag which contained her school books. As she was reaching the school she met the appellant. The appellant told her he was going to take her away from school but the girl said she was not going. In the end she did not go to school. The appellant took her in a taxi to see a film show. After the show the appellant took her to Manickam's house. That night she slept in Manickam's house. She stayed in Manickam's house for about two weeks. Manickam, in his evidence confirmed that the girl and the appellant stayed in his house for two weeks in April 1986. After they left Manickam's house, the appellant took the girl to stay in a rented room in a house belonging to a Chinese.

From the evidence it is clear that on 25 April 1986, the appellant took the girl out of the keeping of the lawful guardianship of her parents. The taking was done without the consent of her parents. It might be possible that the girl consented to go with the appellant. But even if she had consented, her consent was immaterial for the commission of the offence under s 361 of the Penal Code: see *Neelakandan* v *PP.*[3]

In my opinion the learned President was right when she found that the prosecution had made out a prima facie case against the appellant in respect of the first charge.

I shall next consider the second charge. The learned President in her grounds of judgment stated that she was satisfied that the ingredients under s 376 of the Penal Code had been proved, namely, (1) there was sexual intercourse between the appellant and the girl; (2) there was penetration and (3) there was no consent as the girl was below the age of fourteen years.

According to the girl's evidence, there were at least two occasions when she and the appellant had sexual intercourse. The first time was in the appellant's place of work and the second time in the rented room of the Chinese's house. From her evidence on each occasion they had sexual intercourse there was penetration. The doctor who examined her on 13 May 1986 told the court below that there was a fresh tear of the hymen. The abrasion at fourchette was recent. The tear and the abrasion happened within a week. According to the doctor, one of the causes of the tear in the hymen and the abrasion at fourchette was sexual intercourse. Another doctor exa-

mined the appellant on 19 May 1986. He conducted a potency test on the appellant and he found that the appellant was able to have an erection. In his opinion the appellant was able to have sexual intercourse.

In my opinion the evidence of the girl was sufficiently corroborated by the two doctors who examined the girl and the appellant respectively. In a case of this nature, medical evidence is sufficient to corroborate the evidence of the girl: see Ratanlal & Dhirajlal, *The Law of Crimes*, 22nd Ed, p 965.

Mr Ganesh submitted that the girl (PW6) was a 'totally incredible witness' and that there were material contradictions in the evidence of PW6 and PW9. The learned President, at p 2 of her grounds of judgment, made a finding of fact that (a) the fact that sexual intercourse did take place was corroborated by the evidence of the doctor and (b) although there were discrepancies in the evidence of PW6 and PW9, she was of the view that they were minor discrepancies and did not affect the prosecution case in material particulars. I do not disagree with the finding of the learned President.

With regard to the other ingredient, it is immaterial whether the girl gave her consent or not. A person commits an offence of rape when he has sexual intercourse with a girl below the age of fourteen years. In the present case the girl was under fourteen years of age at the material time.

In my view the learned President was right when she found that the prosecution had made out a prima facie case against the appellant in respect of the second charge.

The appellant, in his defence, said that he was in love with the girl. The girl's mother (PW5) knew about it and wanted them to get married. According to him the mother asked him to take the girl away as the girl had often been beaten by her father. He denied raping the girl. He said that he had injured his private part while playing football in India. He denied that when the doctor conducted the potency test on him there was erection.

At the close of the case for the defence the learned President found that the defence had not raised any reasonable doubt in the prosecution case. She accordingly found him guilty of both charges and convicted him. The learned President did not accept the defence story that the mother of the girl asked the appellant to take her daughter away and marry her. The learned President gave her reasons why she did not accept the appellant's story. It should be mentioned here that if the appellant's story was true then why did the mother lodge a police report (P9) on 26 April 1986 that her daughter had not returned home the previous night.

With regard to the second charge, the learned President did not believe the appellant's story. She accepted the evidence of the girl as well as the evidence of the doctor who examined her.

The learned President made her findings of fact based on the evidence adduced before her. I think she has rightly and fairly assessed all the evidence before her and I agree that, after considering the evidence and all the circumstances in this case, the appellant was guilty of both the charges. I therefore confirm the finding of guilty and the conviction of the accused on both charges.

I shall next consider the question of sentence. Mr Ganesh submitted that the sentence in respect of both charges was manifestly excessive. With regard to the kidnapping charge he referred to *Neelakandan's* case[3] where the sentence was reduced from one of eighteen months to four months. But in that case, the girl voluntarily and willingly went to meet the appellant at an agreed place. Mr Ganesh also referred to *Abdul Rahman's* case.[1] In that case the girl eloped with the appellant to Seremban. In the instant case the girl had no intention of going away with the appellant because she was about to reach school in her school uniform and with her school books. It was the appellant who persuaded her to go away with him. The learned President took into consideration the fact that the appellant was a first offender. She said the sentence for kidnapping was fair and reasonable.

In the present case, although the circumstances were different from those in *Neelakandan's* case[3] and *Abdul Rahman's* case,[1] I think four years' imprisonment was excessive. I accordingly reduce the sentence from four years' imprisonment to that of two years' imprisonment from the date of arrest.

With regard to the rape charge, Mr Ganesh referred to *Brabakaran* v *PP*[4] and *PP* v *Selvarajah*.[5] In *Brabakaran's* case,[4] the appellant raped his sister-in-law who was under the age of 14 years. In that case the learned judge considered that the girl was unlikely to suffer any psychological after-effects. The learned judge also considered that there was no serious impediment to her future prospects for marriage because she was to move to another locality with her family. In *Selvarajah's* case,[5] the respondent was charged with an offence of carnal knowledge with a girl under 16 years of age. The offence was committed under s 16(1) of the Women and Girls Protection Act 1963. In the present case the learned President took into consideration that no violence was used and no injuries were caused to the girl. In the circumstances of the present case I find the sentence in respect of the second charge not manifestly excessive. In my view the sentence passed by the learned President should not be disturbed.

I confirm that both sentences should run concurrently.

Order accordingly.

Solicitors: *K Ganesh.*

Reported by *PS Ranjan*